(1)

91-1845

No. -

Supreme Court, U.S.
FILED
MAY 20 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

VARIOUS RECEIVER-PLAINTIFFS,
PETITIONERS,

v.

VARIOUS RAILROAD-DEFENDANTS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MORRIS M. GOLDINGS
Counsel of Record
RICHARD S. JACOBS
MAHONEY, HAWKES & GOLDINGS
40 Rowes Wharf
Boston, Massachusetts 02110
(617) 439-7600
Counsel for Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

62

QUESTIONS PRESENTED

I. Whether 31 individual plaintiff-petitioners shall be deprived of their constitutional rights under the due process clause by virtue of the erroneous, unprincipled and discriminatory dismissal of 1700 freight damage cases by the District Court prompted by the unreasonable fear that docket congestion might cause unacceptable delays in the disposition of other cases, and because of the resultant "distortion of statistics." The dismissals were predicated upon the transparently specious guise of want of prosecution.

II. Whether the District Court for the District of Massachusetts, having erroneously rebuffed every effort by the plaintiff-petitioners to restore to the active docket 1700 freight damage cases administratively closed in 1980, by the purposeful disregard of the plain language of the rule under which they were closed, Rule III(H) of the Administrative Office of the Judicial Conference of the United States, may wrongfully and abusively apply Local Rule 41.1(b)(1) for the sole purpose of dismissal of the cases under the transparently specious guise of want of prosecution.

PARTIES

Receiver-Plaintiffs

Arrow Packing Co.; Boston Celery Co.; Boston Tomato Co., Inc.; B&R Produce; Community Suffolk, Inc.; Charles P. Sweeney d/b/a Sweeney Co.; D'Arrigo Bros., Inc.; Feinberg Co.; Felix Rocco Co.; Forlizzi Bros., Inc.; J.R. Freni; Frontier Produce Co.; Gilfenbain Bros., Inc.; W.H. Lailer Co.; Lampros Bros., Inc.; Matarazzo Bros. Co.; MarcoTomato Co.; Manhatten Tomato Co.; Mid N.E. Produce, Inc.; Nathan Warren and Sons; New England Farms; Prince Tomato Co.; A. Pelligrino & Sons; Royal Tomato Co.; Rodes & Sons Co.; Sawyer & Co.; A.J. Sarno d/b/a Sunlight Tomato, Co.; Stillman Produce Co.; Sunshine Tomato Co.; Tourtellot & Co.; William J. Canaan.*

Railroad-Defendants

Atchison, Topeka & Santa Fe Railway Co.; Bangor & Aroostock R.R.; Boston & Maine Corporation; Burlington Northern Line; Central Cal. Traction Co.; Chicago, Milwaukee, St. Paul & Pacific; Consolidated Rail Cor.; Florida East Coast Railway Co.; Holton Interurban; Illinois Central Gulf R.R.; Northwestern Pacific; Penn Central Transportation Co.; San Diego & Arizona Eastern; Seaboard Coastline Railroad Co.; Santa Maria Valley; Southern Pacific Transportation Co.; So. San Luis Valley R.R.; Stockton Terminal & Eastern; Sunset Railway; Texas Mexican Railway Co.; Trustees N.Y. N.H. & Hartford.

---

*As testified by the Chief District Judge for the District of Massachusetts at United States Senate hearings in 1975 (*infra*), "The plaintiffs are the wholesale distributors of fruits and vegetables for Massachusetts and New England. Substantial distributors on the wholesale top level are involved." App. 15.

TABLE OF CONTENTS

Questions Presented	i
Parties	iii
Table of Authorities	vi
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	2
Rules Involved	2
Statement of the Case	4
Reasons for Granting the Writ	14
I. This Court Should Grant Certiorari to Explicate the Plain Meaning of the Automatic Re-Opening Provision of the Rule of the Judicial Conference of the United States on Administrative Closings of Cases, and to Require District Courts to Adhere to It.	15
II. This Court Should Grant Certiorari to Instruct the Judiciary That Increasing Tension Between Docket Congestion and the Integrity of the Judicial Process Must Be Resolved in Favor of the Rule of Law.	16
Conclusion	21
Appendix	follows page 21

TABLE OF AUTHORITIES

Cases:

Applebaum v. *Ceres Land Co.*, 546 F.Supp. 17 (D. Minn. 1981) 19

Blanchette v. *Cataldo*, 734 F.2d 869 (1st Cir. 1984) 11

Condakes v. *Southern Pacific Co.*, 295 F.Supp. 121 (D. Mass. 1968) 7

Condakes v. *Southern Pacific Co.*, 303 F. Supp. 1158 (D. Mass. 1968) 7

Feif v. *A.H. Robbins*, 90 F.R.D. 526 (E.D. Penn. 1981) 19

Frazier v. *Heebe*, 482 U.S. 646 (1987) 15

Freed v. *Braniff Airways, Inc.*, 119 F.R.D. 10 (S.D. N.Y. 1987) 18

Hickman v. *Taylor*, 329 U.S. 495 (1947) 15

Johnson v. *Rogers*, 917 F.2d 1283 (10th Cir. 1990) 18

Jones v. *Shell*, 572 F.2d 1278 (8th Cir. 1978) 18

Link v. *Wabash Railroad Co.*, 370 U.S. 626 (1962) 15

Markel v. *Scovil Mfg Co.*, 657 F.Supp. 1102 (W.D. N.Y. 1987) 19

Missouri Pacific R.R. v. *Elmore and Stahl*, 377 U.S. 134 (1964) 11

RAAB v. *Taber Instrument Corp.*, 546 F.2d 522 (2nd Cir. 1976) 19

Rollins v. *United States*, 286 F.2d 761 (9th Cir. 1961) 19

S.E.C. v. *Everest Management*, 466 F.Supp. 167 (S.D. N.Y. 1979) 19

TABLE OF AUTHORITIES (cont.)

Sarno, d/b/a Sunlight Tomato Co. v. *Southern Pacific Co.*, 277 F. Supp. 628 (D. Mass. 1967) 7

Schlagenauf v. *Holder*, 379 U.S. 104 (1964) 15,20

Sibbach v. *Wilson & Co.*, 312 U.S. 1 (1941) 15

Thermtron Products, Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976) 17,18

U.S. Industries, Inc. v. *Blake Const. Co.*, 671 F.2d 539 (D.C. Cir. 1982) 18

United States v. *Myers*, 38 F.R.D. 194 (N.D.Cal. 1964) 19

Western Pacific R. Corp. v. *Western Pacific R. Co.*, 345 U.S. 247 (1953) 15

***Statutes*:**

28 U.S.C. § 331 15

28 U.S.C. § 601 15

28 U.S.C. § 603 15

***Rules*:**

Supreme Court Rule 10.1(a) 20

Supreme Court Rule 16.1 21

Guide to Judicial Policies and Procedures, Rule III(H) 2,3n,10,15

Local Rule 41.1 3,13

***Miscellaneous*:**

Hearing before the United States Subcommittee on Improvements in Judicial Machinery, November 13, 1975 7,8,9,17

TABLE OF AUTHORITIES (cont.)

Ex Parte No. 263, 345 I.C.C. 515 (1972) 7

2B Barron & Holtzoff, *Federal Practice and Procedure*, § 918, pp. 139-40 19

Wright & Miller, *Federal Practice and Procedure*: Civil § 2370, p. 20 19

"The Supervisory Power of the Federal Courts," 76 Harvard Law Review 1656 (1963) 15

No. -

In the

Supreme Court of the United States

OCTOBER TERM, 1991

VARIOUS RECEIVER-PLAINTIFFS,
PETITIONERS,

v.

VARIOUS RAILROAD-DEFENDANTS,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Various Receiver-Plaintiffs,[1] respectfully pray that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the First Circuit entered in the above-entitled proceedings on February 21, 1992.

---

[1] The Petitioners have been referred to in all captions and pleadings in the courts below as "Various Receiver- Plaintiffs," the Respondents as "Various Railroad- Defendants," and the 1700 cases which are the subject of this Petition as the "Freight Damage Cases."

A full list of the parties is provided at p. iii.

OPINIONS BELOW

The Order of the Court of Appeals for the First Circuit of which review is sought is reprinted in the Appendix attached hereto, App. 1.

The Memorandum of the United States District Court for the District of Massachusetts (Tauro, J.), referred to and relied on by the First Circuit in its aforementioned Order of February 21, 1992, is reprinted in the Appendix attached hereto, App. 3.

JURISDICTION

The jurisdiction of this Court to review the Order of the First Circuit, dated and entered February 21, 1992, affirming the Order of the District Court for the District of Massachusetts, October 7, 1991, is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment of the Constitution of the United States provides:

> No person shall be . . . deprived of . . . property without due process of law . . .

RULES INVOLVED

Rule III(H) of the *Guide to Judicial Policies and Procedures*, App. 8, provides:

> If a case has been pending for more than three years and no action has been taken for more than twelve

> months, the clerk may submit a JS-6 form to remove the case as a pending matter. The procedural progress at termination should be shown. *The case should not be dismissed.*

If a minute entry is desired it may be phrased as follows:

> This case having been pending for over three years, all presently contemplated proceedings having been completed, and there having been no action herein for over 12 months, there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk is instructed to submit a JS-6 form to the Administrative Office.
>
> *Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and, should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute entry had not been entered.*

(Emphasis added.)

Local Rule 41.1 of the Local Rules of the District of Massachusetts provides:

> (b)(1) [E]ach judge may from time to time give notice of not less than twenty (20) business days of hearing on a dismissal calendar for actions or proceedings assigned to that judge that appear not to have been diligently prosecuted.

STATEMENT OF THE CASE

SUMMARY STATEMENT OF THE CASE

Seventeen hundred (1700) freight damage cases, involvng thirty-one plaintiff-receivers from Massachusetts, Connecticut and Rhode Island were the subject of an unprecedented, discriminatory and unprincipled mass dismissal by the district court for the District of Massachusetts (Tauro, J.), on October 7, 1991. The ostensible basis given was "failure to prosecute," assertedly prior to and after 1987, with reference to a supposed unavailability of evidence. The speciousness of the reason given is revealed in the Court's own Memorandum, which refers to and specifically lists the Petitioners' "repeated efforts" to prosecute these cases. App. 4. The railroads are required by federal regulation to retain their records, 49 C.F.R. § 1220 *et seq.*, and these records have been produced at settlement conferences over the years. Affidavits as to past practice are available in the record of this case, and judicial notice may be taken as to recent state freight damage cases. Both these sources demonstrate that the requisite evidence to proceed is readily available.[2]

The underlying reason for dismissal of the cases is the district judge's expressed but unreasonable fear that continued prosecution would produce "intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases." App. 4. The Court of Appeals affirmed, "for essentially the same reasons," without elaboration. App. 1.

These cases have been the subject for over fifteen years of sometimes intense extrajudicial concern by the Chief Judges

[2] "[T]he defendant railroads, in compliance with Federal Regulations, have previously conveyed to the Plaintiff-Receivers all pertinent documents which resulted from their investigation of the freight loss and damage claims, and the Plaintiffs would be happy to return copies of Defendants' own documents should they have been lost or destroyed." App. 29.

of the district court for the District of Massachusetts and the Court of Appeals for the First Circuit, internally and externally. For example, at a hearing before the United States Senate Subcommittee on Improvements in Judicial Machinery on federal jurisdiction of freight damage claims, held on November 13, 1975, these judges "strongly, indeed fervently" supported a bill which they erroneously "believe[d], if enacted, would eliminate a glut of more than 7,000 small ICC cases presently congesting the docket of [the District of Massachusetts] court." App. 16. The requiring of a $10,000 freight damage claim for federal jurisdiction did nothing, however, to eliminate the legitimately filed cases already on the docket.

In 1978 the Penn Central Railroad, in an attempt to dismiss en-masse the thousands of pending cases, filed a civil action alleging unfair practices and abuse of process on the part of the Receiver-Plaintiffs. All railroads, over vehement objections of the Plaintiffs, suspended settlement practices awaiting resolution of the civil action. Every effort by the Plaintiffs to continue settlements were rejected by the railroads. All docket activity ceased.

In 1980, in an effort to eliminate the distortion of statistics for the federal docket, the court invoked Rule III(H) of the Guide to Judicial Policies and Procedures, and administratively closed for statistical purposes only, all freight loss and damage cases.

The civil action undertaken by the Penn Central Railroad was finally resolved in 1987. Immediately upon final adjudication, the Plaintiffs resumed settlement practices with the railroads. Four defendant carriers settled all outstanding claims. Five major carriers adamantly refused to settle the majority of the 1700 cases remaining outstanding, and it became apparent to the Plaintiffs that, so long as these cases were administratively closed, neither legal nor financial imperative existed to entice the reluctant railroads to settle.

The Plaintiffs undertook actions necessary to restore the cases to the active docket, the sine-qua-non for final disposition of the cases. Seventeen Hundred (1700) individual Motions to Bring Forward were filed covering the outstanding cases. All were denied. Sometime later, one (1) blanket Motion to Restore was filed. This was denied. Five separate Motions for Summary Judgment were filed on cases which had twice before been denied restoration to the active docket, and these were denied because the cases were not on the active docket. Finally, in a state of frustration, Plaintiffs filed a Motion for Determination of Status of the 1700 cases. At this point, Rule 41.1(b)(1) was invoked by the District Court and the 1700 cases were dismissed for "lack of prosecution," and because restoration of the cases "would produce intolerable congestion in this court's calendar, and unacceptable delay in the disposition of other pending cases." App. 4.

The courts below have successfully used judicial process to thwart every attempt by Petitioners to activate the administratively closed cases, notwithstanding the automatic right mandated by the plain terms of the very rule pursuant to which the cases had been closed.

Thus, in an effort to accommodate criminal and other civil cases, an act of gross discrimination has been committed against thirty-one Plaintiffs who, by virtue of the District Court's willful disregard of the plain language of Rule III(H), the Administrative Closing Rule, and its persistent denial to restore 1700 freight damage cases to the active docket, have now been deprived of their Constitutional rights under the Due Process Clause by the dismissal en-masse of said 1700 cases, not on their merits, but for purported failure to prosecute. The unprecedented dismissal of these cases for "want of prosecution," despite Petitioners' acknowledged "repeated efforts" to prosecute and the court's willful disregard of the automatic re-opening provision of Rule III(H), cries for relief in this Court.

1. *The Judges of the District of Massachusetts and the Court of Appeals for the First Circuit Have Long and Actively Sought to Rid the Federal Docket of the Many Freight Damage Cases.*

American railroads have, as an historical practice, used their massive bargaining position over the individual receivers of perishable produce to deny liability and reject and refuse to settle claims notwithstanding clear proof of liability and damages, as detailed by the Interstate Commerce Commission in a landmark decision, *Ex Parte No. 263*, 345 I.C.C. 515 (1972). Such was the practice in the District of Massachusetts, where the railroads' contumacious behavior was not diminished despite their virtually unbroken record of losing the freight damage cases that went to trial and established the law in the area.[3]

Although the railroads' tactic of forcing all meritorious claims into suits threatened to clog the civil justice system, since 1973 approximately ten thousand suits have been resolved through settlement conferences, under orders of the district judges, without a single case having been tried in the federal district court. Little, if any, court participation preceded settlement. An exhibit introduced by Judge Caffrey at a Senate Judiciary Subcommittee Hearing on creating a $10,000 claim requirement for federal jurisdiction of freight damage claims concluded:

> We do not anticipate any significant savings in judge time since a very small percentage of the I.C.C. cases actually go to trial.[4]

---

[3] Several cases resulted in published opinions: *Condakes* v. *Southern Pacific Co.*, 295 F.Supp. 121 (D. Mass. 1968); *Sarno, d/b/a Sunlight Tomato Co.* v. *Southern Pacific Co.*, 277 F. Supp. 628 (D. Mass. 1967); *Condakes* v. *Southern Pacific Co.*, 303 F. Supp. 1158 (D. Mass. 1968). Not one of the litigated cases was appealed by the railroads.

[4] Exhibit VI, Hearing before the Subcommittee on Improvements in Judicial Machinery, November 13, 1975, p.23. In 1972, "1002 of these cases were disposed of in the federal court. Two of them were tried." William P. Westphal, Chief Counsel to the Subcommittee, Hearings, *supra*, p.31.

The real displeasure of the district judges in Massachusetts and the cause of "the deleterious effect of this clog of small cases . . . on the morale of the court," App. 12, was not docket congestion but the "*distortion of statistics*." The chief district judge testified:

> At a meeting of the metropolitan chiefs last week, Massachusetts had the longest median time for civil cases . . . [I]t is obvious that our pending time is being distorted by the presence of these cases . . . [T]hey sit there, and fester, and don't get much action, but they distort our statistics . . .
>
> Every time I go to a meeting of the metropolitan chief judges I have to explain this situation all over again. There are always some judges who are new and want it explained to them all over again.

App. 11-13.

Perhaps believing that the pending and legitimately filed freight damage cases would settle, as was the custom and practice, the chief district judge testified:

> *All members* of this court and *all members* of the Judicial Council of the First Circuit *strongly, indeed fervently*, support S-346 as a Bill *which we believe, if enacted, would eliminate a glut of more than 7000 small ICC* cases presently congesting the docket of this court.

Letter to Senator Quentin Burdick, dated November 5, 1975, submitted as exhibit at hearing. App. 15-16) (emphasis added).[5]

---

[5] Similar sentiments were expressed at the hearing:

> The first point I wish to make, of course, is that the judges of our court, all eight of us, plus the three judges in the U.S. Court of Appeals sitting as a judicial council for the circuit, strongly endorse this bill *because it would eliminate what I have characterized as a glut of small ICC cases*.

App. 10 (emphasis added).

The Chief Judge of the First Circuit wrote to Senator Edward M. Kennedy:

> The removal of these cases would not only ease the flow of paper work in the clerk's office and, to some extent, relieve judges of the almost ministerial task of processing settlement agreements, but would remove from controversy the presence of such cases in the statistics of the Massachusetts court.
>
> Each member of the Council has read Judge Caffrey's letter and wishes to be recorded as *enthusiastically* approving it.

Letter of October 14, 1975, introduced as Exhibit at Hearings, *supra*, App. 20 (emphasis added).

A $10,000 jurisdictional requirement for Interstate Commerce Act cases was created — but the cases already filed necessarily remained on the docket.

2. *The Administrative Closings and the Litigated and Affirmed Propriety of the Filing of the Suits.*

In 1978, the Penn Central Railroad filed a civil action[6] in the District of Massachusetts, attempting to dismiss the thousands of pending freight damage suits en masse by challenging as an unfair practice and abuse of process the Receivers' filing of the thousands of suits. The practice and process of resolution of the cases through settlement largely ground to a halt as most railroads waited to see what effect these charges would have on the situation. The Receivers reluctantly acceded to those circumstances, thereby resulting in a period of inactivity, awaiting the resolution of the *Blanchette* allegations.

During the pre-trial period of *Blanchette*, on September 16, 1980, the Chief Judge of the First Circuit wrote to the Chief

[6] *Blanchette* v. *Cataldo*, Civ. No. 78-2368-S.

Judge of the district of Massachusetts, requesting that the pending freight damage cases be "statistically" closed pursuant to Rule III(H) of the *Guide to Judicial Policies and Procedures*:

> In particular, I remind you and your clerk of the rule approved by the Subcommittee on Judicial Statistics in 1973: that you can *statistically* close any civil case three years old or older to which no action appears imminent. (This can be found in the Statistical Analysis Manual, *Guide to Judicial Policies and Procedures*, Vol. 11, p. II-29).
>
> The [Judicial] Council [of the First Circuit] also requests a report from you by the end of October giving us information as to whatever action you may have taken and your best thinking of what further action should be taken to reduce this problem in your district.
>
> We would appreciate in particular some further planned initiative on the part of your court, e.g., use of special masters, to reduce as much as possible the remaining ICC-case backlog.

App. 6-7 (emphasis added).

In view of the inactivity occasioned by *Blanchette*, the cases were so administratively closed in 1980 pursuant to Rule III(H), which provides and concludes:

> *Nothing* contained in this minute entry *shall be considered a dismissal or disposition of this matter*, and, *should further proceedings in it become necessary or desirable, any party may initiate it* in the same manner as if this minute entry had not been entered.

App. 8 (emphasis added).

In 1982, the district court (Skinner, J.), sitting without a jury, upheld the propriety of the filing of the suits.[7] The Court of Appeals for the First Circuit affirmed:

> We add that we have reached this conclusion *after studying the parties' briefs with care and after reading all of the nearly 4,000 pages of record material* presented in the parties' briefs and appendices. *We undertook this effort* because familiarity with detail seemed necessary to understand the essence of the case and the likelihood of district court error, and because we wished to understand the details, *given the relationship of the case to the administration of justice within the circuit.*

Blanchette v. *Cataldo*, 734 F.2d 869, 872 (1st Cir. 1984) (emphasis added).

3. *Subsequent Efforts to Settle or Prosecute the Cases.*

After post-appeal litigation, the final order in *Blanchette* v. *Cataldo* was entered in February, 1987. Upon final adjudication, four defendant railroads settled all their pending cases. Serious settlement negotiations were conducted with regards to virtually all of the 1700 cases that are subject to this Petition. App. 28.

At hearings in October, 1987 district judge Tauro (the same judge whose later Order is the basis of this Petition), ordered global settlement discussions on the 1700 cases.[8] The discus-

[7] In the trial, the Freight Claims Manager of the Penn Central Railroad responsible for the handling of railroad claims testified that the policy of his railroad was to follow not the decision of the majority of the Supreme Court in the landmark freight damage decision, *Missouri Pacific R.R.* v. *Elmore and Stahl*, 377 U.S. 134 (1964), but rather the dissenting opinion!

[8] At hearings on subsequent motions in 1989 and 1990, district judge Tauro again *ordered* the parties to confer regarding settlement of all the remaining freight damage cases. Several times parties traveled across the country to settlement conferences, but discussions proved fruitless. App. 28-29.

sions broke down, and, in further efforts to prosecute the cases, the Petitioner-Receivers moved to place the remaining freight damage cases on the active docket — as a necessary prelude to settlement,[9] or trial if necessary. The motions to restore to the active docket were denied, despite the plain and mandatory wording of Rule III(H), allowing for the automatic re-opening of the cases.

4. *"Further Proceedings" Pursuant To Rule III(H).*

In 1990, in an additional attempt to avail themselves of the automatic re-opening provisions of Rule III(H), and specifically that segment which reads "and, should further proceedings in it become necessary or desirable, any party may initiate it," the Plaintiff-Receivers filed individual motions for summary judgment in five of the 1700 cases. The Motions for Summary Judgments, ipso facto, restored the cases to the active docket, and the motions were entitled to adjudication on the underlying merits of the cases.

District Judge Tauro ruled "that [the Summary Judgment] motions are essentially motions to reconsider and vacate this Court's prior orders [the denial of two previous motions by Plaintiff-Receivers to restore the cases to the active docket]. This court declines to do so." Thus, the Motions were incorrectly denied on procedural grounds and the cases were neither restored to the active docket nor adjudicated on their merits.[10]

---

[9] The "state of limbo . . . provide[d] [defendant-railroads] neither the legal nor the financial incentives for the cases to be resolved on their merits." App. 31.

[10] The litigation history and efforts to activate and prosecute the cases are summarized in part in a footnote in the district court's Memorandum

5. The Unprincipled Dismissal of the Cases.

In June, 1991, confronted with the enigma that the court would neither restore the cases to active docket nor allow any "further proceedings" unless the cases were first restored, the Petitioners filed a Motion for Determination of Status of Cases. On July 17, 1991, district judge Tauro issued an order to show good cause why the freight damage cases should not be dismissed for "want of diligent prosecution" pursuant to Local Rule 41.1(b)(1), which allows for the dismissal of cases "that appear not to have been diligently prosecuted." The Petitioners' response recited the diligent prosecution in which they had in fact been engaged, including actions taken within the last year, and stated that they continued to stand ready for trial.

On October 7, 1991, characterizing "plaintiffs' [Petitioners'] repeated, unsuccessful efforts at restoration" as "this history of inaction," District Judge Tauro dismissed all of the remaining freight damage cases " for want of prosecution." App. 4.

---

of October 7, 1991 dismissing the cases for "failure to prosecute" prior to 1987:

> In more recent history, these cases were the subject of a motion to "bring forward" [pursuant to Rule III(H)] that this court denied, after hearing, on February 5, 1988. On February 23, 1988, this court denied plaintiffs' motion for reconsideration. There was no appeal.
>
> In April 1989, various receiver- plaintiffs filed motions to "restore" these same 1700 cases. On July 27, 1989, after hearing, this court denied the motion, and stated its reasons in an accompanying memorandum. Plaintiffs appealed, but later withdrew the appeal before it was acted upon.
>
> In 1990, plaintiffs filed motions for summary judgment in five of these cases. This court treated those motions as motions to reconsider and to vacate its prior orders and denied them in a Memorandum dated September 10, 1990. Plaintiffs appealed, but, in an Order dated January 3, 1991, the First Circuit allowed the defendant's appellees' motion to dismiss the appeal for failure to present a substantial question.

App. 3-4.

The underlying supposed justification was that resolution of the cases "would produce intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases." App. 4. Perhaps subconsciously revealing the congestion-driven motivation of the judges who had previously petitioned the Congress on this matter, he added, "the Court of Appeals has already upheld the dismissal of these lawsuits." App. 5.[11]

The First Circuit affirmed, "essentially for the reasons stated in the district court's memorandum of October 7, 1991," without elaboration. App. 1.

The Various Receiver-Plaintiffs respectfully petition this Court for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

It is respectfully urged that this Court grant Certiorari to interpret and authoritatively pronounce the plain meaning of Rule III(H), to correct the abusive exercise of inherent power by the courts below, and to resolve the increasing tension between docket congestion and the integrity of the judicial process in favor of the rule of law and the rights of civil business litigants. All courts and all civil litigants would be benefited by such action of this Court, notably in these days of threatened strangulation of civil case dockets by criminal cases.

---

[11] In dismissing an appeal of the denial of five receiver-plaintiffs' rights to move for summary judgment, the First Circuit had stated in obiter dictum on an issue not presented in the railroads' motion to dismiss the appeal, "the underlying cases, being stale, were properly dismissable for want of prosecution." App. 5.

I. THIS COURT SHOULD GRANT CERTIORARI TO EXPLICATE THE PLAIN MEANING OF THE AUTOMATIC RE-OPENING PROVISION OF THE RULE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON ADMINISTRATIVE CLOSINGS OF CASES, AND TO REQUIRE DISTRICT COURTS TO ADHERE TO IT.

As an important exercise of its supervisory power over the federal courts, this Court has traditionally granted Certiorari to review the validity and construction of federal rules of procedure,[12] local district rules,[13] and Circuit court rules.[14] See generally, "The Supervisory Power of the Federal Courts," 76 Harvard Law Review 1656 (1963), cited by this Court in *Frazier* v. *Heebe, supra* at fn. 12.

Supervisory power should be exercised here to pronounce the plain meaning of the rule of the Administrative Office of the Judicial Conference of the United States [15] on administrative

---

[12] *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941); *Hickman* v. *Taylor*, 329 U.S. 495 (1947) (discovery of attorney work-product under federal rules); *Schlagenauf* v. *Holder*, 379 U.S. 104, 109 (1964) (Rule 35, regarding the ordering of mental and physical examinations of a defendant).

[13] *Frazier* v. *Heebe*, 482 U.S. 646 (1987) (overruling residence requirements for bar of district court).

[14] *Western Pacific R. Corp.* v. *Western Pacific R. Co.*, 345 U.S. 247, 267 (1953):

> We hold that . . . whatever the [en banc] procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it; . . . .

[15] The *Guide to Judiciary Policies and Procedures* is the official medium of the Administrative Office of the United States Courts. *Ibid.*, Vol.I, ch.I, p.1.

The Administrative Office was created by an act of Congress, 28 U.S.C. § 603, and is subject to the supervision and direction of the Judicial Conference of the United States. 28 U.S.C. § 601.

The Judicial Conference is comprised mainly of the Chief Justice of the United States and the Chief Judges and a district judge of each judicial circuit. 28 U.S.C. § 331.

closings, and to require district courts to adhere to it. Rule III(H) of the Guide to Judiciary Policies and Procedures provides:

> Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and should further proceedings in it become necessary or desirable, *any party may initiate it in the same manner as if this minute entry had not been entered.*

App. 8 (emphasis added).

This mandatory provision, automatic in application, could hardly be more clear. Yet, despite the several and strenuous efforts of the Petitioner-Receivers to "initiate further proceedings," the district judge dismissed, "[i]n light of this history of inaction and the administrative status of these cases." App. 4. The circumstances of this matter call for this Court to grant Certiorari and instruct all courts and affected litigants that, regardless of fears of docket congestion or of the "distortion of statistics," due process and the rule of law require that the plain wording of the rule be respected.

II. THIS COURT SHOULD GRANT CERTIORARI TO INSTRUCT THE JUDICIARY THAT INCREASING TENSION BETWEEN DOCKET CONGESTION AND THE INTEGRITY OF THE JUDICIAL PROCESS MUST BE RESOLVED IN FAVOR OF THE RULE OF LAW.

In 1962 in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 631, fn. 7 (1962), relied upon by the district judge below, this Court stated, "in the more populous districts . . . calendar congestion has become a severe problem." In 1975 at the

Congressional freight damage hearings, *supra*, Chief District Judge Caffrey stated, "The impact of the criminal docket has kept the youngest and most vigorous of our six judges trying nothing but criminal cases all year." App. 21. The situation is *far worse* now.

Huge increases in the number of civil and criminal actions generally, and burdensome increases in drug cases and habeas corpus petitions particularly, have caused serious docket backlog, disturbing to parties and judges. But the serious problems of case overload and backlog do not grant license to discriminate against other parties, and are no excuse for the continued prejudice against thirty-one Plaintiff-Receivers by the dismissal of 1700 legitimately filed and meritorious freight damage cases here. It is contradictory, and logically and constitutionally impermissible, for "repeated efforts at restoration" to be termed "this history of inaction" and it is even more outrageous and incomprehensible that motions for summary judgment on five cases, which on two different occasions had been denied restoration to the active docket, should have been dismissed because they were *not* on the active docket. All of this was done by the District Court and approved by the First Circuit. It is a denial of procedural and substantive due process of law to prevent successful action on a case or group of cases and then pretend that there has been no action and dismiss for "want of prosecution."

In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), this Court granted Certiorari and reversed the remanding of a case to state court because of the crowded condition of the federal court docket. In language fully applicable to the instant Petition, this Court stated:

> It is indeed *unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed* in or removed to that court in accordance with

> the applicable statutes. But an otherwise properly removed action may no more be remanded *because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed* or referred to state courts for such reason.

Ibid. at 344 (emphasis added).

The district court's unreasonable fears [16] of the "intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases" are no excuse. While this Court may take judicial notice of the well-publicized and long-standing shortage of federal judges in the district of Massachusetts, "[C]rowded dockets do not excuse compliance with rules and statutes." *Johnson* v. *Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990), summarizing *Jones* v. *Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978). The words of the district court for the Southern District of New York in denying a motion to dismiss for failure to prosecute are also relevant here: "[A]lthough this court's dockets are among the busiest in the nation, [plaintiff] has a due process right to present her case in court." *Freed* v. *Braniff Airways, Inc.*, 119 F.R.D. 10, 11 (S.D.N.Y. 1987). In the instant matter as in *U.S. Industries, Inc.* v. *Blake Const. Co.*, 671 F.2d 539, 551 (D.C. Cir. 1982), "the real reason for dismissal was convenience of judicial administration. That is not a valid ground for dismissing a properly asserted claim."

The Assertion of Want of Prosecution Was a Transparently Specious Guise

The cases at issue were dismissed under the guise of want of prosecution, but the record shows that there has been no

[16] The fears are unreasonable because the cases would likely settle if on the active docket. If not, the use of special masters, as suggested by the Chief Judge of the First Circuit, App. 7, and consolidation of cases pursuant to Local Rule, as suggested by Petitioners, could be employed.

failure to prosecute. During and after 1987, there were court-ordered settlement conferences and intensive and extensive prosecution through the filing of motions to restore the cases to the active docket and motions for summary judgments. The district judge's reaching back to 1987 and before in an attempt to find want of prosecution was without factual or legal basis.

First, there should not be dismissal for inactivity where there was related litigation activity, as there was in the case challenging the propriety of the suits, *Blanchette* v. *Cataldo. S.E.C.* v. *Everest Management*, 466 F.Supp. 167, 171 (S.D.N.Y. 1979); *Markel* v. *Scovil Mfg Co.*, 657 F.Supp. 1102, 1105 (W.D.N.Y. 1987). Second, there were undeniable and undenied settlement conferences and actual settlements before, during, and after *Blanchette*. Even in the context of a single case, settlement activity is sufficient to withstand a motion to dismiss for failure to prosecute. *Feif* v. *A.H. Robbins*, 90 F.R.D. 526, 530 (E.D. Penn. 1981). A fortiori here, where settlement activity was the accepted and in fact court-ordered method of prosecution, before *and after* 1987.

Further, the cases may not now be dismissed for claimed prior inactivity. "[I]f the claim is presently being prosecuted with diligence it cannot be dismissed because at some earlier time plaintiff did not act diligently." Wright & Miller, *Federal Practice and Procedure*: Civil § 2370, p. 204; 2B Barron & Holtzoff, *Federal Practice and Procedure*, 918, pp. 139-40; *RAAB* v. *Taber Instrument Corp.*, 546 F.2d 522, 524 (2nd Cir. 1976) ("breathed new life into dormant cases"); *Rollins* v. *United States*, 286 F.2d 761 (9th Cir. 1961); *Applebaum* v. *Ceres Land Co.*, 546 F.Supp. 17, 22 (D.Minn. 1981) ("Furthermore, Levitt is now prosecuting the claim with diligence. It would be inappropriate for the Court to grant Ceres' motions at this time."); *United States* v. *Myers*, 38 F.R.D. 194, 197 (N.D.Cal. 1964). Furthermore, there has been significant docket activity and diligent prosecution of the cases not only over

the years but also specifically and extensively within the last year.

"The writ [of certiorari] is appropriately issued . . . when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenaut* v. *Holder, supra*, 379 at 110. Foremost among "the character of reasons that will be considered" in determining when this Court will grant a petition for a Writ of Certiorari is, "When a United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10.1(a). This is such a case. The "strong, indeed fervent" feelings of the judges in the courts below concerning docket congestion and the "distortion of statistics" caused by these legitimately filed and meritorious cases cannot be allowed to displace due process of law.

CONCLUSION

Therefore, based on the foregoing reasons and authorities, the Petitioners respectfully urge that a Writ of Certiorari be granted.

Pursuant to Supreme Court Rule 16.1, this Court may order a summary disposition, instructing the courts below to allow the reactivation of the 1700 freight damage cases that are the subject of this Petition.

Respectfully submitted,

MORRIS M. GOLDINGS
Counsel of Record

RICHARD S. JACOBS
MAHONEY, HAWKES & GOLDINGS
40 Rowes Wharf
Boston, Massachusetts 02110
(617) 439-7600
Counsel for Petitioners

May 21, 1992

TABLE OF CONTENTS

Order of the United States Court of Appeals for the First Circuit, dated February 21, 1992 A1

Order of the District Court for the District of Massachusetts, dated October 7, 1991 A2

Memorandum of the District Court for the District of Massachusetts, dated October 7, 1991 A3

Letter from the Honorable Frank M. Coffin, Chief Judge of the Court of Appeals for the First Circuit, to the Honorable Andrew A. Caffrey, Chief Judge of the United States District Court for the District of Massachusetts, dated September 16, 1980 A6

Guide to Judicial Policies and Procedures, Section III(H) A8

United States Senate Subcommittee Hearings on Federal Jurisdiction of Freight Damage Claims A9

Local Rule 41.1 – Dismissal for Want of Prosecution A23

Affidavit of John M. Cataldo A25

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 91-2188

VARIOUS RECEIVERS, ET AL.,
PLAINTIFFS, APPELLANTS,

v.

VARIOUS RAILROADS, ET AL.,
DEFENDANTS, APPELLEES.

Before

TORRUELLA, *Circuit Judge*,
CAMPBELL, *Senior Circuit Judge*,
and SELYA, *Circuit Judge*.

ORDER OF COURT

Entered February 21, 1992

We have considered the motion to dismiss and the opposition thereto, including appellants' brief, and the record on appeal. We agree with appellees' contention that no substantial question is presented and affirm essentially for the reasons stated in the district court's memorandum of October 7, 1991.

Affirmed. Loc. R. 27.1.

By the Court:

Francis P. Scigliano
Clerk.

[cc: Messrs. Goldings, Chused, Gleason, Ferriter, Inselise, Osborne and Ms's. Insoft, Lipton]

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs,
Plaintiffs,

v. Freight Damage Cases[1]

Various Railroad-Defendants,
Defendants.

ORDER

October 7, 1991

TAURO, D.J.

For the reasons stated in the accompanying Memorandum, this case is hereby dismissed, with prejudice.

/s/ _____
United States District Judge

[1] A complete list of all these cases is listed in the Appendix attached to the Memorandum.

A3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs,
Plaintiffs,

v. Freight Damage Cases[1]

Various Railroad-Defendants,
Defendants.

MEMORANDUM

October 7, 1991

TAURO, D.J.

On June 27, 1991, plaintiffs filed a Motion for Determination of Status of Cases with respect to approximately 1700 interstate freight damage cases that were administratively closed more than a decade ago.[2] In a prior Memorandum, this court noted

---

[1] A complete list of all these cases is listed in the Appendix attached to the Memorandum.

[2] In more recent history, these cases were the subject of a motion to "bring forward" that this court denied, after hearing, on February 5, 1988. On February 23, 1988, this court denied plaintiffs' motion for reconsideration. There was no appeal.

In April 1989, various receiver-plaintiffs filed motions to "restore" these same 1700 cases. On July 27, 1989, after hearing, this court denied the motion, and stated its reasons in an accompanying memorandum. Plaintiffs appealed, but later withdrew the appeal before it was acted upon.

In 1990, plaintiffs filed motions for summary judgment in five of these cases. This court treated those motions as motions to reconsider and to vacate its prior orders and denied them in a Memorandum dated September 10, 1990. Plaintiffs appealed, but, in an Order dated January 3, 1991, the First Circuit allowed the defendants-appellees' motion to dismiss the appeal for failure to

that "despite their successful opposition to defendants' stay request, plaintiffs did nothing to prosecute these cases [for] . . . nine years." Memorandum dated July 27, 1989 at 2. In fact, the cases were administratively closed in 1980 and, following plaintiffs' repeated, unsuccessful efforts at restoration, remain so even to this day. In light of this history of inaction and the administrative status of these cases, this court issued an Order dated July 17, 1991 pursuant to Local Rule 41.1(b)(1) requiring the parties to attend a hearing on September 27, 1991 to show cause why these cases should not be dismissed for want of diligent prosecution.

In response to this Order, both parties filed Certificates in compliance with Local Rule 41.1.(b)(1). This court then conducted a hearing on the issue of dismissal on September 27, 1991. Plaintiffs have failed to identify any good reason, either in their Certificate or at the September 27, 1991 hearing, which would justify the nine-year delay in prosecution of these cases. This prolonged period of unjustifiable inactivity has allowed the evidentiary trail in these cases, some of which are twenty years old, *see, e.g.*, CA Nos. 70-1398-F and 71-939-G, to cool to the point where resolution of the underlying factual issues would be so difficult and time consuming that it would produce intolerable congestion in this court's calendar and unacceptable delay in the disposition of other pending cases. *See Link* v. *Wabash Railroad Co.*, 370 U.S. 629-30 (1962). Moreover, so long a delay has substantially prejudiced the defendants, as witnesses' memories have faded and physical evidence has disappeared. *See Boudwin* v. *Graystone Ins. Co., Inc.*, 756 F.2d 399, 401 (5th Cir. 1985). The parties have not suggested any lesser sanction, short of dismissal, which would address these concerns, and this court, on its own considera-

---

present a substantial question. *Various Receiver Plaintiffs* v. *Penn Central Transportation Co., et al.*, No. 90-1963 slip op. at 2 (1st Cir. Jan. 3, 1991).

tion, finds no other adequate alternative. *See id.*; *Locascio* v. *Teletype Corp.*, 694 F.2d 497, 499 (7th Cir. 1982). Indeed, the Court of Appeals for the First Circuit has already upheld the dismissal of these lawsuits, noting that "the underlying cases, being stale, were properly dismissible for want of prosecution . . . ." *Various Receiver Plaintiffs* v. *Penn Central Transp. Co., et al.*, No. 91-1963, slip op. at 1 (1st Cir. Jan. 3, 1991). Accordingly, this court exercises its inherent power to dismiss *sua sponte* for lack of prosecution, *see Link*, 370 U.S. at 639-31, and orders the dismissal, with prejudice, of all these actions.

An Order will issue.

/s/ _____
United States District Judge

A6

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

156 FEDERAL STREET
PORTLAND, MAINE 04112

September 16, 1980

Honorable Andrew A. Caffrey
Chief Judge, U.S. District Court
1503 Post Office and Courthouse
Boston, Massachusetts 02109

Dear Chief Judge Caffrey:

Acting on behalf of our Judicial Council, I am enclosing the latest print-out of civil cases pending as of June 30, 1980 three years or more. Mr. Foley tells us that the percentage of such cases to total civil cases nationally is 11.7% — an all time high.

We have no desire to put you or your clerk to fruitless work but ask that, with your clerk's help, you go over the list to identify cases which may be susceptible to some kind of action. You may be able to identify some problems that may account for a number of old cases. In particular, I remind you and your clerk of the rule approved by the Subcommittee on Judicial Statistics in 1973: that you can statistically close any civil case three years old or older to which no action appears imminent. (This can be found in the Statistical Analysis Manual, Guide to Judicial Policies and Procedures), Vol. 11, p. II-29).

The Council also requests a report from you by the end of October giving us information as to whatever action you may have taken and your best thinking of what further action should be taken to reduce this problem in your district.

We would appreciate in particular some further planned initiative on the part of your court, e.g., use of special masters, to reduce as much as possible the remaining ICC — case backlog.

We shall much appreciate your cooperation in this effort.

Sincerely,

Frank M. Coffin

trans. 10 vol. XI
July 1, 1978

Special Situations

Three-year old cases

If a case has been pending for more than three years and no action has been taken for more than twelve months the clerk may submit a JS-6 form to remove the case as a pending matter. The procedural progress at termination should be shown. The case should not be dismissed.

If a minute entry is desired it may be phrased as follows:

> This case having been pending for over three years, all presently contemplated proceedings having been completed, and there having been no action herein for over 12 months there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk is instructed to submit a JS-6 form to the Administrative Office.
>
> Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and, should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute entry had not been entered.*

*Approved by the Subcommittee on Judicial Statistics April 26, 1973.

A9

FEDERAL JURISDICTION OF FREIGHT DAMAGE CLAIMS

HEARING

BEFORE THE

SUBCOMMITTEE ON

IMPROVEMENTS IN JUDICIAL MACHINERY

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-FOURTH CONGRES

SECOND SESSION

ON

S. 346

NOVEMBER 13, 1975

Printed for the use of the Committee on Judiciary

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON: 1976

STATEMENT OF HON. ANDREW A. CAFFREY, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Judge CAFFREY. I think the letter I sent to the committee gives you an outline of what I had in mind for my presentation. I have prepared a number of exhibits which I will refer to. I brought along three sets of the exhibits if the committee would care to receive them.

Senator BURDICK. They will be received as part of the record without objection.

Judge CAFFREY. The first point I wish to make, of course, is that the judges of our court, all eight of us, plus the three judges in the U.S. Court of Appeals sitting as a judicial counsel for the circuit, strongly endorse this bill because it would eliminate what I have characterized as a glut of small ICC cases.

Exhibit I shows the statistics as of the first of the month. There were 7,191 ICC cases pending in Massachusetts. I had my staff prepare and analyze a list of the actual figures involved in the closing of two groups of these cases.

Exhibit I(a) includes all cases filed in the calendar year 1973 and assigned to me personally. All of those cases have been closed as of the time my secretary transcribed the figures.

They amounted to 206 cases. You will see that the exhibit gives the docket number, the filing date, the addendum, the closing date, and the dollar amount of settlement.

At the last page, I summarize the dollar amount. You will see that 20 of the cases were closed without any payment whatsoever; 57 of them were settled for something between $100 and $300; 36 were between $300 and $500; 49, $500 up to $1,000 and the rest, some figure over $1,000. To update this, I had my staff make a second exhibit, exhibit I(b). This time we took all of the cases for the entire court filed in the calendar year 1974 and closed as of October 24, 1975.

Again, I have the same information as I just mentioned with reference to these cases. You will see the column totals are that 50 of these were closed without payment, 43 less than $300, 32 less than $500, 34 less than $1,000, and 19 for something over $1,000.

In total, these exhibits reflect the fact that of 384 cases, 62 percent were settled for less than $500, 84 percent closed out for less than $1,000. The largest dollar amount involved in any case was $3,700. Only eight of them involved a figure over $3,000.

I have acquired a second piece of evidence which I refer to in my letter and that is an IBM runoff.

The Administrative Office of the U.S. Courts ran off a computer printout of all the ICC cases filed with us from 1970 through 1972, which were still pending as of June 1975. That document reflects that as of June 30, the end of the fiscal year, there were 175 of the cases pending which means all of those have got a pending time of at least 42 months.

There were 700 of those cases filed in 1972 which are still pending and that means they have a minimum pending period of 30 months, or a median of 36 months. There were still nine cases pending since 1970 which means they were 54 months old.

I mention this for this reason. At a meeting of the metropolitan chiefs last week, Massachusetts had the longest median time for civil cases. It was 19 months. If you crank into your average statistics these periods of 54, 42, and 30 months, it is obvious that our pending time is being distorted by the presence of these cases.

These cases pend, and pend, and pend for the simple reasons that the requirements of the speedy trial act, with the priority given to civil rights cases and other emergency matters, these cases do not get much judge attention. The result is that they sit there, and fester, and don't get much action, but they distort our statistics.

I should say that these cases do not involve any practical use of the Federal Rules of Civil Procedure or the Federal discovery tools. There is nothing about these cases that they require Federal court as the forum.

Exhibit II is a sample pleading which I just signed the day before yesterday showing you the printed complaint, the routine answer, the agreed statement of fact, and a piece of paper I signed. That can be done in any court. That can be done in a justice of the peace court as well as a Federal court as a practical matter.

Senator BURDICK. That is mass production.

Judge CAFFREY. Without any question, Senator.

Exhibits III, IV, and V are the three relevant documents from the State courts. I have the opinion of the judge in the municipal court who tried the case, and that of the three-judge appellate court. It took Mr. Infelise 1 year to get from the trial court to the Supreme Court of Massachusetts. He got the original ruling in June 1967 and 3 days short of 1 year he got the supreme court ruling.

Mr. Infelise, having gotten a favorable ruling, declined to take his business back to the State courts where similar cases are handled in every other one of the 50 States, as far as I know.

I would like to call attention to the fact that Mr. Kirks in his annual report has a very specific comment as to the deleterious effect of this clog of small cases. I could say also on the morale of the court. In all other Federal district courts, this type of case is less than one-half of 1 percent of the total caseload.

Our court has 64 percent of all cases pending in the country. Exhibit VI shows the extra costs to the taxpayers and I think the figure was $62,000 in the exhibit.

Exhibit VI(a) shows that these figures have been slightly changed. The figure has been changed from $62,000 to $66,000 as a result of the recent 5 percent pay raise to Federal employees.

Senator BURDICK. It will be received without objection.

Judge CAFFREY. Thank you.

I would like to point out that what has happened in Massachusetts could happen in any State other than Florida or California. Every time I go to a meeting of the metropolitan chief judges I have to explain this situation all over again. There are always some judges who are new and want it explained to them all over again.

That plus the exhibits pretty much covers what I had in mind for presentation.

If there is anything I omitted to say, I think it is in my letter to the committee.

Senator BURDICK. Thank you, judge. You presented your case very precisely. I got the picture in a hurry.

I have a few questions for you. In your testimony before this committee when we were considering the omnibus district judgeship bill, you recommend a jurisdictional limit from $3,000 to $5,000. Do you have any opinion as to what is preferable, $10,000 as in this bill or something lower?

Judge CAFFREY. The $10,000 would be much more realistic. I did not think it was my job to tell the Senate what they ought to do about it but if the Senate picked 10, I support that.

Senator BURDICK. I assume that exhibit I(a) and exhibit I(b) are a sampling.

Judge CAFFREY. The first group are all my cases which were closed as of a certain date and the second exhibit is the cases that were registered with all the judges.

Senator BURDICK. Do you think this is a representative sampling?

Judge CAFFREY. Yes.

Senator BURDICK. These cases were handled in State court but have moved to your court after an erroneous State court ruling. What was the nature of the case?

Judge CAFFREY. It was a routine case of this type in which the trial judge admitted the certificate of the State inspector.

The trial judge admitted that as evidence. The appellate division of the municipal court made a wierd ruling in which they construed the words "the courts of the United States" as excluding all State courts.

They also ruled these were not business records. The Supreme Court said we won't go into the question whether the State court is included in the phrase "courts of the United States" because the records were business records of the Department of Agriculture.

It is immaterial that they were not business records of the shipper. They reversed the appellate division and ordered that these records be admissible in courts in Massachusetts.

Senator BURDICK. The trend of cases did not reverse?

Judge CAFFREY. No, sir. The cases have been with us ever since.

Senator BURDICK. I would like your opinion on the argument that perhaps this bill is an overkill and that the cure is more harmful than the disease. Would the denial of access to the Federal court prejudice the small plaintiff and how do State procedures differ?

Judge CAFFREY. These cases do not involve the use of any of the Federal Rules of Procedure, particularly with reference to pretrial discovery. The State courts have recently adopted the Federal Rules of Civil Procedure as the rules of procedure for the State of Massachusetts.

At the same time procedural things available in our court are now available in the State courts. The entry fee in the State court is $5. It is $15 in our court. It costs the plaintiff 3 times as much to come into our court as in a State court.

Second, every other plaintiff in every other State except Massachusetts, who is using the appropriate court of that particular State is in the State courts.

I am conversant with what is going on in other Federal courts. It is just a fluke and a freak that we have them and

nobody else does. The plaintiffs are the wholesale distributors of fruits and vegetables for Massachusetts and New England.

Substantial distributors on the wholesale top level are involved.

Senator BURDICK. The plaintiff is not prejudiced by being in State court?

Judge CAFFREY. I say no.

Senator BURDICK. These cases are nearly always settled and you have stated that little, if any, court participation precedes settlement. Would this be changed in the State court?

Judge CAFFREY. I am not that conversant with what Mr. Infelise would do but he can explain his problems better than I. I understand he has to get court action so the defendant carrier can get contributions from connecting carriers.

Senator BURDICK. Thank you very much, judge. You have been very helpful. I commend you for keeping it within the limits of time.

Judge CAFFREY. I think I have a fairly fast moving courtroom.

[Exhibits submited by Chief Judge Caffrey follow:]

UNITED STATES DISTRICT COURT
Boston, Mass., November 5, 1975.

Hon. QUENTIN N. BURDICK,
U.S. Senator, Senate Office Building, Washington. D.C.

DEAR SENATOR BURDICK: In response to your letter of October 21, 1975, requesting that I submit a statement regarding my intended testimony relative to S-346 to the subcommittee at least forty-eight hours before the scheduled hearing date, I wish to advise that I plan to testify substantially as follows:

All members of this court and all members of the Judicial Council of the First Circuit strongly, indeed fervently, support

S-346 as a Bill which we believe, if enacted, would eliminate a glut of more than 7,000 small ICC cases presently congesting the docket of this court.

My office has prepared and I plan to file with the committee two exhibits analyzing the dollar amounts involved in 206 cases filed in 1973. The other exhibit covers 178 cases filed in 1974. Both exhibits establish that the vast majority of these 384 cases were settled for ridiculously low figures as compared to the cost of processing litigation in the federal court.

I am also prepared to file an exhibit setting out the pending case statistics for the individual members of this court as of November 1, 1975, which will show that as of that date there were 7191 of these ICC cases pending.

I next plan to file as exhibits and to discuss with the committee, if requested to do so, the opinion of the Supreme Judicial Court of Massachusetts in *Sawyer & Company* v. *Southern Pacific Company*, 354 Mass. 481, as well as the report of a judge of the Boston Municipal Court who rendered the original decision in that case, and an opinion of the appellate division of the Boston Municipal Court. These opinions, between them, constitute the historical fluke which brought this mass of ICC cases to this court. The erroneous ruling by the Appellate Division appears to be the prime reason that the District of Massachusetts is presently saddled with 64.1% of all the ICC cases filed among the total of 93 federal district courts.

I would respectfully plan to testify to the committee that although Massachusetts presently is the only federal district court on whose dockets small ICC cases amount to more than one-half of 1% of the total docket, it is nevertheless true under the present version of 28 U.S.C. § 1337 that any metropolitan federal court located in any state other than Florida, California and possibly Arizona, could be inundated with a mass of identical cases should counsel in any of those metropolitan areas

elect at any future time to use the federal rather than the state courts that they are presently using.

I will be prepared to explain to the committee the degree of judge-participation necessary to dispose of these cases and to explain why they cannot be settled by counsel without judicial participation in the settlement procedure.

I next plan to advise the committee that I have arranged to have a representative of the Financial Management Division of the Administrative Office of the United States Courts present at the hearing for the purpose of testifying as to the actual cost to the United States of processing these cases in this court.

Lastly, I would like to file with the committee as an exhibit, my letter of September 16, 1975 to the Honorable Edward M. Kennedy, which discusses in detail the impact of these cases on this court's operation and which includes an evaluation thereof contained in the Annual Report of Mr. Rowland Kirks, Director of the Administrative Office of the United States Courts.

I would also like to advise the committee that the most recent Administrative Office statistics establish that the median time for disposing of civil cases in this court is 19 months, the highest median in the entire federal court system. It is my opinion that this long median is due in large part to the longevity of these ICC cases.

The last exhibit I plan to file with the committee is a letter written on October 14, 1975 by Chief Judge Frank M. Coffin, on behalf of the Judicial Council of the First Circuit, to Senator Kennedy, in which letter the Judicial Council strongly endorses S-346.

It is possible that one or two additional pieces of evidence may become available to me between now and November 13 and, if so, I would request the opportunity to present them although not referred to in this letter.

Sincerely,

ANDREW A. CAFFREY.

EXHIBIT VII
UNITED STATES DISTRICT COURT.
Boston, Mass., September 16, 1975.

Hon. EDWARD M. KENNEDY,
U.S. Senator, Senate Office Building,
Washington, D.C.

DEAR TED: Confirming our telephone conversation of last Thursday, September 11, 1975. I wish to advise that on June 23, 1975 Senator Burdick introduced a Bill captioned S. 346. I have been advised by a member of Senator Burdick's staff that this Bill was instigated by my testimony before Senator Burdick's subcommittee on February 2, 1973 and certain correspondence between Mr. Westphal of the Senator's staff and myself dealing with the inundation of the Massachusetts docket by trivial freight damage cases.

The thrust of Senator Burdick's S. 346 would be to amend 28 U.S.C. § 1337 so as to insert therein a jurisdictional minimum requirement that the bill of lading for the shipment involved in the case exceed $10,000 exclusive of interest and costs.

To illustrate the very small dollar amounts involved in the settlement of cases presently being filed in this court, in the absence of such a jurisdictional requirement, I enclose herewith an analysis of settlements made in about 200 of these cases assigned to me, which analysis shows the dollar amount involved in each case is trivial when compared to the cost of processing a case in a Federal District Court.

The presence of these cases, which, as of September 1, 1975 totalled 6,898 cases pending in this court, is having a very deleterious effect on the currency of our civil docket as was noted in the Annual Report of the Director of the Administrative Office of the United States Courts. (Page XI-57 of the Report for fiscal year 1975.) Mr. Kirks stated:

> "The case flow of I.C.C. cases in the district courts continue to show that six out of ten of them are filed, terminated or pending in only one district court, Massachusetts. Stated another way, in the other 93 district courts, on a percentage basis I.C.C. cases comprise about a half of a percent of the workload. These statistics illustrate how in a single district a specialized caseload envelopes the entire court, thereby affecting its overall procedures in disposing of the civil caseload. It is therefore, no surprise that this district has the highest per judgeship pending civil caseload among the 94 courts, 1737 compared to 278 for the 93 other district courts."

In our conversation you indicated that you would be amenable to using your good offices, with Senator Burdick's committee, in bringing this Bill on for a hearing and hopefully moving it on to enactment. Such enactment would substantially eliminate use of this court for trivial cases and send them back to the state courts which are being used in all other parts of the United States for such litigation.

As a further point of interest, Mr. Kirks states, on page XI-125, that Massachusetts "accounts for approximately 83% of the national total for this nature of suit. These cases receive a weight of .57 and seldom require court action."

In his letter to me of February 20, 1975, Senator Burdick asked me to make myself available to testify at the hearing on S. 346 and expressed the opinion that the hearing would be held early in the spring of 1975. Despite the fact that this timetable has been delayed by more pressing matters, I wish to advise that I am available to testify in support of this Bill as is the Clerk of our Court.

If I or any member of the staff of this court can be of any assistance to you or any member of your staff, please do not hesitate to call.

Thank you for your cooperation in this matter.

ANDREW A. CAFFREY,
Chief Judge.

EXHIBIT VII

UNITED STATES COURT OF APPEALS,
FOR THE FIRST CIRCUIT.
Portland, Maine, October 14, 1975.

Hon. EDWARD M. KENNEDY.
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: I write on behalf of the Judicial Court of our Circuit to endorse Chief Judge Caffrey's request contained in his letter to you of September 16, 1975, to support S. 346. As his letter explains in more detail, this bill would eliminate from federal jurisdiction an oppressive quantity of small freight damage claims from the docket of the Massachusetts district court. The removal of these cases would not only ease the flow of paper work in the clerk's office and, to some extent, relieve judges of the almost ministerial tasks of processing settlement agreements, but would remove from controversy the presence of such cases in the statistics of the Massachusetts court.

Each member of the Council has read Judge Caffrey's letter and wishes to be recorded as enthusiastically approving it.

FRANK M. COFFIN,
Chief Judge.

Senator SCOTT. Judge Caffrey?

Judge CAFFREY. The American Law Institute could not possibly have known about this situation because it did not develop until after 1969. Second, I would like to make the point that Mr. Infelise has expressed the great expertise of my colleagues and myself in matters Federal and as Mr. Westphal has pretty well brought out, you settle 1,000 out of 1,002 cases, there is not much expertise called upon.

These cases do not involve sophisticated or difficult legal ruling by any judge of our court. So I say that the claimants do not need Federal judge expertise. The judges of the State courts today are much more conversant with Federal law due to the recent changes in the legal operation so that these cases are perfectly adequate for State courts and they are in State courts in all the other 49 States, which puts to rest any question that this type litigation cannot be handled by State courts.

With regard to getting these cases tried, they just are not tried and they are not about to be tried.

With regard to the meat grinder operation Mr. Westphal mentioned, that would temporarily give some relief but these cases are being filed five a day, 25 a week, at least 1,200 a year, so they would be back in a very short time.

On the cost to the United States, the change from the document I filed to the one he handed me this morning reflects the 5-percent pay increase.

Mr. Infelise has referred to Judge Caffrey's problem. The problem is not Judge Caffrey's. It is the problem of the people who would like to have the judges of the Federal court involved in other litigation.

It is not personal to me. The impact of the criminal docket has kept the youngest and most vigorous of our six judges trying nothing but criminal cases all year. This type case is not going to be the subject matter of any Federal judicial expertise even if it were necessary which I submit it is not.

With regard to the fact, there may be some cases where it needs a ruling, a significant case could be procesed for a ruling, but the mass produced things would be just as well off on the State side of the slate.

Senator SCOTT. Thank you, gentlemen. This will conclude the hearings. We will adjourn the hearings but should there be something else you would like to submit for the record, feel free to do so.

[Whereupon, at 11:05 a.m., the subcommittee adjourned subject to call of the Chair.]

UNITED STATES DISTRICT COURT

LOCAL RULES

RULE 41.1 DISMISSAL FOR WANT OF PROSECUTION

(a)(1) Whenever in any civil action the clerk shall ascertain that no proceeding has been docketed therein for a period of ONE (1) year, he shall then mail notice to all persons who have entered an appearance in such a case that, subject to the provisions of subsection (a)(3), the case will be dismissed without further notice thirty (30) days after the sending of the notice.

(2) After the thirtieth day following the sending of the notice, without order of the court the clerk shall, subject to the provisions of subsection (a)(3), enter an order of dismissal for all cases on the list. It shall not be necessary for the clerk to send additional notice of the dismissal to any counsel or party.

(3) A case shall not be dismissed for lack of prosecution if within thirty (30) days of the sending of notice an explanation for the lack of proceedings is filed and the judge to whom the case is assigned orders that it not be dismissed.

(b)(1) Additionally, each judge may from time to time give notice of not less than twenty (20) business days of hearing on a dismissal calendar for actions or proceedings assigned to that judge that appear not to have been diligently prosecuted. Unless otherwise ordered by the assigned judge, each party shall, not less than ten (10) business days prior to the noticed hearing date, serve and file a certificate describing the status of the action or proceeding and showing that good cause exists for the court to retain the case on the docket. Nothing in this rule precludes the filing of a motion for dismissal under Rule 41(b) of the Federal Rules of Civil Procedure.

(2) Failure on the part of the plaintiff to file the required statement or his failure to appear at the scheduled hearing shall be grounds for the dismissal of the action.

(c) The dismissal of a case pursuant to this rule shall not operate as an adjudication on the merits unless the court on motion of a party directs otherwise.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Various Receiver-Plaintiffs,
Plaintiffs,

v. Freight Damage Cases

Various Railroad-Defendants,
Defendants.

AFFIDAVIT OF JOHN M. CATALDO

I, John M. Cataldo, being duly sworn depose and state:

1. I have been proprietor of National Freight Traffic Service since 1945. In this capacity I have filed claims on behalf of the named Plaintiff-Receivers in the pending freight damage cases.

2. At the time of the filing of the freight loss and damage claims which ultimately became the subject matters of the cases pending before this Court, the defendants were common carriers subject to regulation by Federal Statutes, and by the decrees of the Interstate Commerce Commission. Accordingly, the defendant railroads were mandated to compile all pertinent data with respect to the transportation of perishable shipments and they were compelled to convey this information to the claimant upon presentation of a freight loss and damage claim. This exchange of pertinent documents was faithfully carried out by the defendant carriers and it obviated the need on the part of the plaintiffs to seek additional discovery upon the commencement of litigation. This federally mandated investigative requirement, plus the sheer number of freight damage

cases filed in this Court, prompted deviations from the normal procedures utilized to prosecute the average lawsuit. Since 1965, over 20,000 lawsuits involving freight loss and damage claims have been processed in this Court. This enormous volume of cases created the imperative for the Defendants, the Plaintiffs, and even the Court to forgo the usual methods for the prosecution of the cases.

3. In the late 1960's, approximately fifteen freight damage cases were tried and judgments entered in the U.S. District Court in Massachusetts, establishing the law on various contested points. Under pressure of the Court, settlement conferences were then held. A District Judge would give trial lists to the parties and tell them to confer and come back with status reports. For years thereafter, freight damage cases were settled voluntarily by the parties on the basis of the decided law without the need for additional trials. The railroads insisted, however, that damage claims become lawsuits first because railroad Freight Claim Rules required that stipulated settlements be entered as court judgments in order to allow paying carriers to seek reimbursement from participating railroads. This insistence upon court judgments by the railroads was directly responsible for the avalanche of lawsuits which inundated this Court.

4. Although in a few instances interrogatories and answers to interrogatories were filed subsequent to the resolutions of the questions of freight damage law, it was the consistent practice of all the parties that, except for the entry of judgment, the freight damage cases would be settled or dismissed without docket activity irrespective of the length of time a case was on the docket.

5. Thus, since 1968 thousands of freight loss and damage cases have been resolved in this Court without the need for unnecessary discovery procedures. Had the Plaintiffs undertaken additional motions in this Court for discovery and for the

production of documents previously submitted to them by the defendants, such actions would have been deemed by the railroads as unwarranted harassment. Yet, aside from the final judgment, which was predicated upon agreed statements of facts, no activity of any kind was recorded on the docket. The fact that all unresolved cases remained on the active docket compelled continual activity in the prosecution of the cases, which resulted in the settlement of thousands upon thousands of cases.

6. The filing of the *Blanchette* case, however, produced a dramatic interruption of the smooth functioning of the settlement procedures developed over many years between the railroad Defendants and the Receiver-Plaintiffs. The *Blanchette* case, according to Penn Central attorney John Hally, was specifically intended to cause such disruption and to bring about wholesale dismissal of all pending suits. It must be noted, however, that this case involved extensive discovery procedures which led to the production of millions of documents, including thousands from the pending cases. This, in itself, constituted an intense form of "prosecution of the cases."

Subsequent to the filing of *Blanchette*, the Southern Pacific Railroad, in a further effort to forestall the continuing out-of-court settlements, introduced a "Motion for a Moratorium" on such settlements. Defendant's Memorandum in response to Court Order of July 17, 1991, makes reference to this Motion and states that "Attorney Frank Infelise . . . opposed the request (for a Moratorium) on the basis . . . that the commencement of the (*Blanchette*) litigation should not disrupt the judicial processes of this Court." The Memorandum continues, "During the entire pendance of *Blanchette* (from September 1978 until February 20, 1987 . . . the Receiver-Plaintiffs did nothing to prosecute the Law Suits." The stated objective to be attained by Attorney Infelise in his opposition to the Moratorium was to continue the out-of-court settlements strongly favored by

some railroads and vehemently opposed by other railroads. Unfortunately, even though the Motion for a Moratorium was denied by the Court, a former Counsel to Penn Central Railroad made it clear to those railroads in favor of continuing the settlement process in existence before *Blanchette*, that the Penn Central would, henceforth, refuse to reimburse participating railroads for Penn Central's proportion of any claim settlements. Subsequent to this action all railroads, without exception, ceased to participate with the Plaintiff-Receivers in any out-of-court settlements. In short, the Penn Central Railroad and the Southern Pacific Company attained *de facto* what they failed to attain *de jure*.

Even during the pendance of *Blanchette*, and subsequent to the administrative closing of the cases, continual conversations and meetings occurred between Plaintiffs' attorneys and the legal representatives of many of the defendant railroads. These exchanges constituted repeated attempts to importune the defendants to resume the practices of settlement extent prior to *Blanchette*. As a result of this continual dialogue, upon final adjudication of *Blanchette*, the Union Pacific, Western Pacific, Missouri Pacific, and Seaboard Coastline Railroads settled all pending cases out-of-court. True to its promise, the Penn Central Railroad refused to reimburse those railroads for their just apportionment under appropriate Freight Claim Rules, so much so that the Seaboard Coastline Railroad commenced litigation against the Penn Central in an effort to recover that which they believe is justly due them.

Subsequent to *Blanchette*, and to the filing of 3000 individual motions to restore the pending cases to the active docket, Judge Tauro ordered all parties to negotiate settlement of all claims. To this end, Plaintiffs' representatives journeyed to California on two separate occasions to conference claims over a span of ten days with the Southern Pacific Railroad. The Southern Pacific representatives, in turn, visited Boston on at least three

occasions to discuss settlements. Similarly, several conferences were held with the Santa Fe and Penn Central Railroads. This activity was in addition to the items listed in the "Summary of Litigations Activity."

7. In Defendant's Memorandum in response to Court Order of July 17, 1991, it is alleged that prejudice would result to the defendants inasmuch as "many of the documents relating to the more than 2,200 shipments involved in the Lawsuits have, in many cases, been inadvertenly lost or destroyed." As previously explained, the defendant railroads, in compliance with Federal Regulations, have previously conveyed to the Plaintiff-Receivers all pertinent documents which resulted from their investigation of the freight loss and damage claims, and the Plaintiffs would be happy to return copies of Defendants' own documents should they have been lost or destroyed.

8. The second way in which the Railroads allege that prejudice would result relates to the defendants' professed reliance for the defense of the cases upon "oral testimony of lay witnesses whose availability and ability to remember events which occurred anywhere from 15 to 20 years ago is unlikely." Throughout the years, cases have been tried principally in the Boston Federal District Court. Virtually all of the cases previously tried covered trans-continental shipments transported by many different railroads over a span of 3000 miles. Not one witness who testified on behalf of the defendant railroads was an "eye-witness" to any segment of the movement, either at origin, in transit, or at destination. Before deregulation, the railroads were transporting tens of thousands of cars of fruits and vegetables, and thus the probability of finding an employee who had an independent recollection of any specific rail shipment was highly unlikely. Furthermore, each of the pending claims alleges some specific act of railroad negligence such as delay, refrigeration failure, or bruising resulting from rough handling in transit. In rail shipments of 3000 miles, it is vir-

tually impossible to become an eye-witness to unpredictable delays which cause the missing of a vital connection, or to the fact that the refrigeration did *not* malfunction in transit, but was on a defrost cycle, or that a freight car was *not* bumped at a speed in excess of the allowable limit to cause extensive bruising. Even in those instances where a railroad representative personally inspected the merchandise at its final destination, the railroads presented as a witness their Chief Inspector who had not seen the shipment in preference to the individual who physically performed the inspection.

9. Accordingly, in the past, those called upon by the railroads to help defend their cases were "expert" witnesses who drew conclusions from business records and not from a recall memory. Thus, the time span between the date of shipment and the trial of the case, be it 1 or 10 or even 20 years, was rendered totally irrelevant in the prosecution of the cases. Hence, the burden should be placed upon the railroads to identify the individuals who were eye-witnesses to the shipment and who are now handicapped because of the passage of time.

10. Were it to develop that the railroads could produce such eye-witnesses, each case should be handled on a case-by-case basis. Justice would hardly be served by the dismissal of 2200 cases because a few aberrations might present themselves.

11. As previously noted, the de facto Moratorium on settlements which resulted from *Blanchette*, provoked the administrative closing of 2200 cases, thereby delaying their settlement for twelve long years. Yet, only nine Receiver-Plaintiffs were party to the *Blanchette* case. There are an additional twenty-nine Receiver-Plaintiffs not included by the railroads as defendants in *Blanchette* who have become innocent victims by virtue of the administrative closing of their pending lawsuits. This injustice would be severely compounded by the dismissal of cases which would have been resolved on their merits years ago had they been allowed to remain on the active docket.

12. It has become my firm conviction, unfortunately, that the cooperative spirit which permeated the pre-trial conferences before *Blanchette* has been supplanted within the ranks of the few remaining defendants by the expectation that the pending cases will either be dismissed on technical grounds, or remain administratively closed, a state of limbo which will provide neither the legal nor financial incentives for the cases to be resolved on their merits. Plaintiffs, in good faith, have attempted every prudent remedy known to them to diligently prosecute cases which have been administratively closed. The fact that, thus far, these efforts have not been successful, ought not be interpreted as a lack of effort, willingness or eagerness to diligently prosecute the cases. Recent history suggests that these cases will not be resolved until they are restored to the active docket. This action of restoration will remove the shackles of the administrative closings from the hands of the plaintiffs. Only then will it be apparent to all that the plaintiffs stand ready to prosecute these cases with as much diligence as is required, a position which the plaintiffs have held since the date of each individual filing.

Signed this 20 day of September, 1991, under the pains and penalties of perjury.

/s/ _____

John M. Cataldo